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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VICENTE ERNESTO LOPEZ, Defendant and Appellant.	G041006 (Super. Ct. No. 07ZF0008) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Marks & Brooklier, Anthony P. Brooklier and Donald B. Marks for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

Vicente Ernesto Lopez appeals from a judgment after a jury convicted him of four counts of premeditated and deliberate attempted murder, possession of a firearm within 1,000 feet of a school, and street terrorism, and numerous firearm and street terrorism enhancements. Lopez argues: (1) the trial court erroneously admitted gang expert testimony, (2) the court erroneously limited defense counsel's direct examination on his only defense witness, and (3) insufficient evidence supports his convictions and the jury's findings on the enhancement allegations. None of his contentions have merit, and we affirm the judgment.

FACTS

On December 3, 2005, someone fired a gun at Gustavo Renteria's residence—Renteria was a Devious Hoodlums (DH) gang member. Two days later, just before noon, Jason Correa, a "La Colonia" gang member was standing in front of school with Ervin Avalos, Marcos Buenrostro, and Jose Contreras. Correa saw a black Ford Taurus with four Hispanic men drive by and make a U-turn—Contreras saw five Hispanic males in the car. The driver stopped about 10 feet away from Correa and his companions. Someone from inside the car asked, "Where are you from?" Contreras responded he did not "bang."

Correa testified that before he could respond, someone in the car's backseat pointed a gun at him and fired approximately five shots. Contreras however testified Correa replied "Colonia" before the shooter opened fire. Correa was shot once, and a bullet remains lodged near his spinal cord.

Contreras told law enforcement officers the driver was wearing a dark color, hooded sweatshirt. At the hospital, Correa denied he was a gang member.

Later, nearby the location of the shooting, law enforcement officers found a black Ford Taurus crashed into a garage. The car was registered to Lopez. Officer Juan Reveles spoke with Lopez about the car and Lopez stated the car was stolen and he had not driven the car on the day in question.

Five days later, Officer Bruce Linn interviewed Lopez at the Anaheim police station.[1] After advising him of his *Miranda*[2] rights, Lopez admitted he was driving his car when someone sitting in the back seat opened fire on a group of men. He explained a man named "Juan" called him, and asked Lopez to pick him up at a nearby school. Lopez stated that when he arrived at the school, Juan and three other men got into his car. Lopez admitted he knew "DH" stood for Devious Hoodlums but said Juan was not a Devious Hoodlums gang member. He said the group was going to pick up and smoke marijuana. Lopez stated that on the way to a liquor store, one of the men in the back seat told him to make a U-turn. The backseat driver told him to stop the car because he had to "ask this fool" a question. Lopez said the man pulled out a gun and started firing. Lopez insisted he did not know the man had a gun. He explained that after the shooting, the man removed a gray sweater and beanie and told Lopez to dispose of them and not say anything. Lopez said he drove to a nearby park and told the men to get out of the car. Lopez said that as he drove away, he crashed his car into a garage.

Law enforcement officers conducted a follow-up investigation and could not confirm there was a "Juan" in the car at the time of the shooting. Ballistics evidence revealed all the bullets, including one found in Lopez's car, were fired from the same firearm.

An amended indictment charged Lopez with four counts of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))[3] (count 1-Jason Correa, count 2-Ervin Avalos, count 3-Marcos Buenrostro, count 4-Jose Contreras), possession of a firearm within 1,000 feet of a school (§ 626.9, subd. (b)) (count 5), and street terrorism

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1 A videotape of the interview was played for the jury.

2 *Miranda v. Arizona* (1966) 384 U.S. 436.

3 All further statutory references are to the Penal Code, unless otherwise indicated.

(§ 186.22, subd. (a)) (count 6). The amended indictment alleged Lopez committed counts 1, 2, 3, 4, and 5 for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) With respect to counts 1, 2, 3, and 4, the amended indictment alleged he was a gang member who vicariously used a firearm (§ 12022.53, subds. (b) & (e)(1)), and who vicariously discharged a firearm (§ 12022.53, subds. (c) & (e)(1)). The amended indictment also alleged he was a gang member who vicariously discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)(1)), with respect to count 1. Finally, the amended indictment alleged he suffered a prior serious and violent felony conviction (§§ 667, subds. (a)(1), (d) & (e)(1), 1170.12, subds. (b) & (c)(1)).

At trial, the prosecutor offered the testimony of a gang expert, Officer Juan Reveles. After detailing his background, training, and experience, Reveles testified concerning the culture and habits of criminal street gangs. He testified concerning the use of nicknames (monikers), graffiti, and tattoos as means to represent gang membership. He explained gang members have become reluctant to discuss gang membership with police officers because of increased punishment, and gang members who "rat or snitch" on other gang members are punished or "taxed." He stated criminal street gangs have allies, rivals, and "whatevers" and when a gang members asks, "Where are you from?" it is a challenge to determine the person's status.

Reveles testified gang members are expected to "backup" fellow gang members. He explained gang members generally commit crimes in groups because each gang member has a specific role, and for protection. He stated trust between gang members is crucial because they commit crimes together and pass information to one another, and because gang members spend so much time building trust with one another, a gang member will not commit a crime with a non-gang member. Reveles said every gang wants to be the most feared gang in the area, and a gang instills fear in the community by committing violent acts. He added gang members boast about the crimes they commit because it increases their status in the gang, and rival gang members will

fear and respect them and the gang. He stated if a gang is disrespected, the gang must retaliate or "payback" in a manner equal to or greater than the initial disrespect. He explained an active participant of a criminal street gang is a person who commits crimes and is involved in the gang while an associate is one who "hang[s] out" with gang members. He opined though that once an associate helps a gang, the associate becomes a gang member.

Reveles explained the significance of guns in gangs. He stated a gun is a "prize possession" in a gang, and gang members pass guns around to avoid detection, and gang members are aware who has a gun. He said a "gang gun" is owned by the gang, and not an individual gang member. He opined that if a "gang gun" is taken on a "mission," the expectation is the gun will be used. He said gang members talk about who has the gun because they need to know who has it.

Reveles testified regarding DH, also known by the name "Perdido Street." He discussed the required predicate offenses, opined DH was a criminal street gang as statutorily defined, and said its primary activities were felony vandalism, assaults, shootings, robberies, and drug sales. He stated DH's rival was La Colonia. He explained officers interviewed another self-admitted DH gang member, Erlin Jones, in connection with another firearm-related offense. He stated Jones disclosed DH was having problems with La Colonia, it possessed several guns of different calibers that gang members passed to each other, and when a gang member has a gun, he "tells everybody else that he is carrying the gun[.]"

Reveles identifies gang members through their admissions, associations, actions, tattoos, and by speaking with gang members and their family and friends. He opined Lopez was an active participant of DH at the time of the offenses. He based his opinion on the following: (1) Lopez committed a 2004 robbery with Renteria and Casey Ahumada, both known DH gang members, and Dexter Pascual; (2) law enforcement officers contacted Lopez and Renteria together months before the shooting; (3) the

shooting of Renteria's house just days before this incident; (4) the rolls of shooter and driver are the two most significant roles in a shooting, and it was significant Lopez was the driver because it demonstrated he was trustworthy; (5) someone in the car issued a gang challenge; (6) a car passenger was a known DH gang member; and (7) officers found indicia of gang membership in his car.[4]

Based on a hypothetical mirroring the facts of this case, Reveles opined the crimes were committed for the benefit of the gang, and to promote, further, or assist other criminal conduct. He based his opinion on the fact the crimes elevated the gang's status because the gang members challenged a rival gang, claimed their gang membership, and retaliated against the rival gang. He admitted not every crime a gang member commits is a gang crime committed for the benefit of a gang.

On cross-examination, Reveles testified there was no evidence Lopez had ever received a STEP notice, a notice law enforcement officers give gang members warning them of the consequences of committing a crime. Reveles admitted that in the June 2004 robbery, neither Lopez nor Renteria was charged with having committed the offense for the benefit of a gang, and there was no evidence anyone shouted DH or claimed gang membership. He also conceded there was no evidence Pascual was a DH gang member. Reveles stated law enforcement officers found no indicial of gang membership in Lopez's residences.

Lopez focuses on the following facts to support his claim the court erred in admitting the evidence: (1) Pascual was not a DH gang member; (2) there was no evidence any of the men claimed DH during the robbery; and (3) Lopez was not prosecuted for committing the robbery for the benefit of a gang.

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[4] The Attorney General twice claims law enforcement officers found 12 items of gang indicia in Lopez's residences. Wrong. Officers found those items in one of the car's passenger's residence.

Lopez offered the testimony of Andres Garcia, who pled guilty to lesser charges before Lopez's trial. Garcia testified Lopez, whose nickname was "Tito," was driving the car, and Garcia was sitting in the right rear passenger seat while Victor Tapia[5] was sitting next to him and Jorge Correa (Jorge) was sitting in the front passenger seat. Garcia thought they were going to a nearby school to purchase marijuana. Garcia explained that when Lopez stopped the car, Jorge asked the victim where he was from, and the victim responded La Colonia. Garcia stated Tapia pulled a gun from his sweater, reached across Garcia, and fired the gun numerous times. Garcia testified he was surprised, and stated Jorge asked Tapia why he did that, and Tapia responded, "Shut up. Every man on your own from now on." Garcia admitted he was a DH gang member. He stated Lopez did not grow up in the neighborhood, and was not around much, and he never saw Lopez claim to be a DH gang member.

On cross-examination, Garcia admitted that during his first interview with police, he claimed he did not know where the school was, he had not seen Jorge since Thanksgiving, and that Garcia was working the day of the shooting, which when pressed he later recanted. He also said he told police he was not with Lopez, Tapia, or Jorge the day of the crime. Garcia stated sitting in a car and yelling "DH" and shooting a gun would make someone a DH gang member. Garcia testified that during a second interview with police he stated Tapia was the shooter, and he was afraid to tell the truth because he knew how "those guys are." During this interview, he told police there were four men in the car, and he admitted one of the men, "Holek," was a DH gang member, and he knew there was going to be "trouble." Garcia explained he had been at Renteria's house the day after it was shot at, and the shooting of Correa was done as an initiation, and in retaliation. He also told police neither Renteria nor anyone in the car were DH

[5] We affirmed Tapia's convictions in our nonpublished opinion *People v. Tapia* (May 18, 2010, G041646).

gang members. Finally, he testified he told police the shooter was wearing a black and grey sweatshirt and a beanie.

The jury convicted Lopez on all counts and found true all enhancements. After the trial court denied Lopez's new trial motion, the court sentenced him to a total term of 45 years to life in prison.

DISCUSSION

I. Expert Gang Testimony

Lopez contends the trial court erroneously admitted gang expert testimony concerning (1) the basis for Reveles's opinion he was an active participant in a criminal street gang, (2) the legal definition of active participant in a criminal street gang and his opinion concerning whether he was an active participant in a criminal street gang, and (3) one of the predicate offenses. We will address his first claim as it is the only evidence he objected was inadmissible.

A. Forfeiture

The Attorney General argues Lopez forfeited appellate review of this issue because he did not object to admission of any of the complained of testimony. Relying on *People v. Simon* (2001) 25 Cal.4th 1082, 1103 (*Simon*), Lopez responds he did object to admission of the gang expert testimony by way of his pretrial motion to exclude/limit gang evidence. We agree two of his claims are forfeited and one preserved for appellate review.

In *Simon*, the California Supreme Court stated: "'"'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .'" [Citation.] "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' . . ." [Citation.]" (*Simon, supra,* 25 Cal.4th at p. 1103.)

This is the extent of *Simon's* relevance to this case as it involved the failure to object to venue.

Before trial, Lopez moved to exclude or limit the admission of gang evidence because it was irrelevant, unduly prejudicial, and a violation of his federal due process rights. In his written motion, he objected to the admission of 22 areas of gang evidence. Evidence he did not object to, however, was testimony concerning what qualifies as active participation in a criminal street gang, whether Lopez was an active participant in DH at the time of the offenses, Jones's criminal history, and gang guns. Nor did Lopez object to admission of any of this evidence during trial, a point he does not dispute. Therefore, these claims are forfeited. (*Simon, supra,* 25 Cal.4th at p. 1103.) With respect to the 2004 robbery conviction, Lopez objected to admission of testimony he was an active participant in DH at the time of the offense because he committed a 2004 robbery with Renteria, and that they were both on probation. Thus, because he objected to admission of this evidence in his pretrial motion, we will address the merits of his claim.

B. 2004 Robbery

Lopez argues the trial court erroneously admitted Reveles's testimony concerning his 2004 robbery conviction as a basis for his opinion Lopez was an active participant in DH at the time of the offense because its probative value was substantially outweighed by its prejudicial effect. Not so.

It is well established, "[t]he subject matter of the culture and habits of criminal street gangs[]" is the proper subject of expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*).) A gang expert may base his testimony about the culture, habits, and primary activities of a gang on hearsay. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9, see *People v. Pollock* (2004) 32 Cal.4th 1153, 1172 ["an expert may base an opinion on hearsay"].) However, "the trial court has discretion to 'exclude from the expert's testimony "any hearsay matter whose irrelevance,

unreliability, or potential for prejudice outweighs its proper probative value.'" [Citation.]" (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1325.)

In his written pretrial motion, Lopez moved to exclude/limit the following evidence to prove he was an active participant in DH at the time of the offenses at issue here: evidence "[h]e committed a robbery with . . . Renteria and they were both on probation for it[.]" At the hearing on the motion, the parties agreed the trial on the prior robbery conviction would be bifurcated. The prosecutor, however, stated she intended to introduce evidence of the 2004 robbery of a 7-Eleven by Lopez, Renteria, Ahumada, and Pascual to prove Lopez was an active participant in a criminal street gang.

Defense counsel argued the rationale underlying bifurcation of the trial of the truth of the prior robbery conviction also compelled the exclusion of expert testimony concerning the 2004 robbery. Additionally, defense counsel stated it was unclear whether the other men were DH gang members or whether the robbery was gang related. Finally, defense counsel asserted there were other ways to prove Lopez was an active member of DH at the time of the offenses here.

The trial court ruled admissible evidence Lopez committed the 2004 robbery with Renteria, but not the fact he was on probation. The court reasoned the 2004 robbery was recent and there was evidence Renteria was a DH gang member. The court found compelling Lopez and Renteria committed a crime the previous year and that just two days before the offenses here, someone shot at Renteria's house. The court opined Lopez and his confederates had a motive to retaliate against La Colonia. The court concluded that although evidence Lopez committed a 2004 robbery was prejudicial, its probative value outweighed its prejudicial effect.

At trial, after the prosecutor elicited Reveles's opinion Lopez was an active participant in DH at the time of the offenses, the prosecutor questioned him concerning the basis for his opinion. When Reveles testified that just months before these offenses a police officer stopped Lopez and Renteria in a car, the prosecutor began to ask why that

was important. Reveles responded it was important because their probation conditions forbade them from associating with each other. The trial court sustained defense counsel's objection and struck the answer. The prosecutor asked Reveles whether he was aware of a robbery they committed in 2004. Reveles responded he was aware of the robbery, and that Lopez, Renteria, Ahumada, and Pascual committed the robbery, and three of them were DH gang members.

We conclude the trial court properly admitted testimony concerning the 2004 robbery as a basis for Reveles's opinion Lopez was an active participant in a criminal street gang at the time of the offense. First, it was proper for Reveles to rely on commission of the 2004 robbery in forming his opinion Lopez was an active participant in DH at the time of the offenses here in December 2005. The evidence was relevant because Reveles believed Renteria was a DH gang member, DH and La Colonia were rivals, someone shot at Renteria's house two days before the offenses here, and Lopez drove a car in which someone challenged a La Colonia gang member and shot him. In other words, Lopez committed a crime with a known gang member in 2004, the gang member's house was later shot at, and therefore, when Lopez drove the getaway car with Renteria, Lopez must have also been a DH gang member. Although this evidence was prejudicial because the jury heard Lopez committed a 2004 robbery, the brief reference to a robbery pales in comparison to opening fire on four unsuspecting men standing in front of a school.

Further, during Reveles's testimony, the trial court admonished the jury he considered other evidence in forming his opinion, and the jury could consider that other evidence only in evaluating the strength of his testimony and not for its truth. The trial court also instructed the jury with CALCRIM No. 332 on the proper method for evaluating expert testimony.

Lopez focuses on the following facts to support his claim the court erred in admitting the evidence: (1) Pascual was not a DH gang member; (2) there was no

evidence any of the men claimed DH during the robbery or that the robbery was gang related;[6] and (3) Lopez was not prosecuted for committing the robbery for the benefit of a gang. These facts go to the weight of the evidence and not its admissibility. The jury could have considered these facts in deciding the strength of Reveles's opinion Lopez was an active participant in DH at the time of the offense. Thus, to the extent Lopez's claims are preserved, the trial court properly admitted gang expert testimony.

II. Evidence of Garcia's Plea Agreement

Lopez contends that during direct examination, the trial court improperly limited his defense counsel's questioning of his only witness, Garcia, concerning his plea agreement. Not so.

"The credibility of a witness may be attacked or supported by any party, including the party calling him." (Evid. Code, § 785.) However, the trial court must balance the probative value of such evidence against any prejudicial effect. (Evid. Code, § 352, emphasis added.) We review the trial court's admission of collateral impeachment evidence, and the decision that it is more probative than prejudicial for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

"[T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 821-822 (*Fauber*).) "Full disclosure is not necessarily synonymous with verbatim recitation, however. Portions of an agreement irrelevant to the credibility determination or potentially misleading to the jury should, on timely and specific request, be excluded." (*Fauber, supra,* 2 Cal.4th at p. 823.)

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[6] The Attorney General again misconstrues the record. There is no evidence Lopez's confederates in the 2004 robbery admitted committing the robbery for the benefit of a gang. The Attorney General instead cites to the 1999 robberies that the prosecutor relied on to prove the predicate offenses.

During trial, before Garcia testified, defense counsel indicated that on direct examination he intended to elicit from Garcia the following facts: the prosecutor charged him with the same counts as Lopez; he faced a 64-years-to-life prison sentence with a minimum sentence of 32 years to life; and "he cut a deal as jury selection was being conducted." Defense counsel explained that during his first two interviews with law enforcement officers, Garcia never mentioned anything about looking for someone to attack. Defense counsel stated the prosecutor offered Garcia a plea deal only after his third interview where he admitted they were looking for someone to attack. The prosecutor responded she did not offer any of Garcia's statements, she was not calling him as a witness, and what he testified to was of no consequence to her because he was not her witness. The prosecutor contended defense counsel was trying to poison the jury with Garcia's possible sentence if he had not pled guilty.

The trial court stated it was familiar with Garcia's testimony and had read the transcript of his statement to the police. The court concluded that when defense counsel calls a witness to impeach the witness with a plea deal, the prejudice outweighs any probative value. Defense counsel pressed the issue. The prosecutor replied it was possible to impeach Garcia with his subsequent interviews without mentioning the plea deal. The court stated defense counsel was permitted to ask Garcia whether it was true the only reason he stated they were looking for someone to attack was because he was offered a plea agreement. Defense counsel believed that one question was "ineffectual." The court opined an inquiry into the full details of the plea agreement was "more prejudicial than probative." But the court stated the plea agreement had some relevance to the changing of Garcia's story. The court permitted defense counsel to inquire whether Garcia pled guilty to lesser charges.

During direct examination, defense counsel asked Garcia whether he had been a defendant in this case, whether his attorney was in court, and whether he was in jail. Garcia responded "yes" to each question. When defense counsel asked Garcia

whether he had "pled guilty to lesser charges in this case[]" he replied, "Yes." When defense counsel asked him whether he received a plea deal, the trial court sustained the prosecutor's "beyond the scope" objection. Garcia again agreed he had recently pled guilty to "lesser charges."

On cross-examination, the prosecutor elicited from Garcia that he had three interviews and he told different stories during each interview. On redirect examination, defense counsel asked Garcia whether he admitted gang membership pursuant to his plea deal, whether his "plea deal was with this prosecutor." Garcia replied "yes" to both questions. When defense counsel attempted to explore whether Garcia had testified against his other defendants, the trial court sustained the prosecutor's objections.

The trial court permitted defense counsel to inquire into whether Garcia pled guilty to lesser charges, and whether he admitted to gang membership as part of a plea deal. Additionally, the jury heard his testimony Garcia changed his story during his three interviews with law enforcement officers. Based on this evidence, it is reasonable to conclude the jury was aware Garcia pled guilty to lesser charges in exchange for his testimony. The trial court properly limited defense counsel to his plea to lesser charges because any further inquiry, including his motivation or potential sentence, was more prejudicial than probative. Finally, the trial court instructed the jury with CALCRIM No. 226, "Witnesses," which explains to the jury how it is to evaluate a witness's testimony, including whether the witness's testimony was influenced by bias or prejudice. Therefore, the trial court struck a fair balance between allowing Lopez to establish Garcia pled guilty to lesser charges and limiting further inquiry to avoid digressing into collateral matters.

III. Sufficiency of the Evidence

Lopez asserts insufficient evidence supports his convictions and the jury's findings on the enhancement allegations. We will address each of his contentions in turn.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citations.] [¶] "'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

A. Attempted Murder

Lopez contends insufficient evidence supports his attempted murder convictions. We disagree.

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*Smith, supra,* 37 Cal.4th at p. 739.) "Willful" means intentional, deliberate means deciding to act after thoughtful consideration, and premeditated means the act was considered beforehand. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

Here, the prosecutor argued the jury could convict Lopez of counts 1 through 4 based on aiding and abetting or the natural and probable consequences doctrine. And the trial court instructed the jury on both theories of liability. Because it is unclear under which theory the jury convicted Lopez, we must discuss both.

1. Aiding and Abetting

"To be guilty of a crime as an aider and abettor, a person must 'aid[ ] the [direct] perpetrator by acts or encourage[ ] him [or her] by words or gestures.' [Citations.] In addition, . . . [citations] . . . , the person must give such aid or encouragement 'with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,' the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must 'know[ ] the full extent of the [direct] perpetrator's criminal purpose and [must] give[ ] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

Lopez claims there was no evidence he had knowledge of the perpetrator's unlawful purpose or the intent to commit, encourage, or facilitate commission of the offense. Although we agree there was no evidence of any planning and there was evidence of one passenger's surprise at the presence of the gun and the shooting, based on the entire record before us we conclude there was sufficient evidence from which the jury could reasonably conclude Lopez aided and abetted the attempted murders.

The evidence at trial demonstrated the following: On December 3, someone shot at Renteria's house. Renteria was a known DH gang member, and DH gang members believed its rival, La Colonia, was responsible for the shooting. The prior year, Renteria had committed a robbery with Lopez and two other men, one of whom was a known DH gang member. Just months before the shooting of Renteria's house, law enforcement officers contacted Renteria and Lopez together. Garcia, a self-admitted DH gang member, told police officers the attack was an initiation for prospective DH gang members and in retaliation for La Colonia shooting at Renteria's house.

Reveles testified gang members are expected to "backup" fellow gang members, and when gang members go on a "mission," each gang member has a specific role. He explained trust between gang members is crucial because they are so close and a gang member will not commit a crime with a non-gang member. He opined gangs commit violent crimes to be the most feared gang in the community, and if a gang is attacked it must retaliate or risk losing respect. He added gangs instill fear in the community by committing violent acts, and to commit violent acts gangs use guns, which are their most "prized possession." He opined generally gang members know who has the gun, and if a "gang gun" is taken on a "mission," the gun will be used. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [expert may testify gang members traveling together may know if one of their group is armed] (*Killebrew*).) Reveles stated the two most important roles in a drive-by shooting are the shooter and the driver. He believed the driver is important because the driver is trusted to flee the scene of a crime without being attacked or caught.

From this evidence, it was reasonable for the jury to conclude Lopez, an active participant in DH, as we discuss below, was charged by his fellow gang members with driving the vehicle in which other armed DH gang members were preparing to retaliate against La Colonia for shooting at his confederate's house, and initiate new members. Thus, the jury could reasonably infer Lopez knew of Tapia's criminal purpose, and facilitated commission of the crime by driving the getaway car.

To support his claim insufficient evidence supports his convictions, Lopez asserts there was no evidence of any discussion in the car concerning a gun or shooting someone, after the shooting, Correa asked Tapia why he shot at the men, and Garcia did not know Tapia was armed. The jury heard the evidence and resolved the credibility determinations against Lopez. Resolution of conflicting evidence and credibility issues was for the jury to decide. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*).)

Therefore, sufficient evidence supported his attempted murder conviction under an aiding and abetting theory.

2. Natural and Probable Consequences Doctrine

We now turn to another theory of vicarious liability—the natural and probable consequences doctrine. In *People v. Prettyman* (1996) 14 Cal.4th 248, 261, the Supreme Court reiterated the principles of natural and probable consequences. "'[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.] Thus, . . . a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime."

"Therefore, when a particular aiding and abetting case triggers application of the 'natural and probable consequences' doctrine . . . the trier of fact must find that the defendant, act[ed] with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the

offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Prettyman, supra,* 14 Cal.4th at p. 262, fn. omitted.)

As we explain above, there was sufficient evidence Lopez knew of Tapia's unlawful purpose and intended to facilitate and aide a crime, here disturbing the peace, in retaliation for the shooting. Further, there was overwhelming evidence Tapia committed a crime other than disturbing the peace, attempted murder. As to the last element, *People v. Montes* (1999) 74 Cal.App.4th 1050 (*Montes*), another case from this court, is instructive.

In *Montes*, a confrontation between rival gangs quickly escalated into a street brawl that culminated in the shooting of one of the participants. (*Montes, supra,* 74 Cal.App.4th at p. 1055.) The court affirmed an aider and abettor's conviction of attempted murder, despite lack of evidence he knew his confederate was armed with a gun. The court held that in the context of a gang confrontation, a jury may find murder is the natural and probable consequence of "targeted offenses of simple assault and breach of the peace for fighting in public," regardless of whether participants knew weapons were on hand. (*Id.* at p. 1055.) The court stated, "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them. Given the great potential for escalating violence during gang confrontations, it is immaterial whether Montes specifically knew Cuevas had a gun." (*Id.* at p. 1056.)

Here, when Lopez drove a car occupied by other armed gang members attempted murder was the natural and probable consequences of disturbing the peace. Thus, there was sufficient evidence supporting Lopez's attempted murder convictions under either an aiding and abetting theory or the natural and probable consequences theory.

B. Possession of a Firearm

Lopez claims insufficient evidence supports his convictions for possessing a firearm in a school zone because there was no evidence he actually or constructively possessed the firearm. We disagree.

Section 626.9, subdivision (b), provides, "Any person who possesses a firearm in a place that the person knows, or reasonably should know, is a school zone, as defined in paragraph (1) of subdivision (e), unless it is with the written permission of the school district superintendent, his or her designee, or equivalent school authority, shall be punished as specified in subdivision (f)." One may have either actual or constructive possession of an article. "Actual possession occurs when the defendant exercises direct physical dominion and control over the item . . . . [Citation.] Constructive possession does not require direct physical control over the item 'but does require that a person knowingly exercise control or right to control a thing, either directly or through another person or persons.' [Citation.]" (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1608-1609, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856, 867.)

Reveles testified that based on his education, training, and experience, guns are a "prize possession" in criminal street gangs, and the "gang gun" is owned by the gang, and not an individual gang member. He explained criminal street gang members pass guns around to avoid detection, and gang members are always aware who has a gun. He opined if a "gang gun" is taken on a "mission," the expectation is that the gun will be used. He said gang members talk about who has the gun because they need to know who has it. Additionally, Reveles stated Jones, a known DH gang member, disclosed to law enforcement officers that DH possessed several guns and when a gang member has a gun, he "tells everybody else that he is carrying the gun[.]" Contrary to Lopez's assertion otherwise, this was sufficient evidence for the jury to reasonably and logically conclude Lopez, an active participant in DH, as we discuss anon, knowingly exercised control or

the right to control the gun himself or through the his fellow DH gang member. (*Killebrew, supra,* 103 Cal.App.4th at p. 658.) The testimony of a single witness, here Reveles, is sufficient for the proof of any fact. (See *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.)

C. Street Terrorism-Substantive Offense

Lopez argues insufficient evidence supports his conviction for street terrorism because there was no evidence he was an active participant in a criminal street gang or that he aided and abetted a separate felony offense by gang members. Based on the entire record, we conclude there was sufficient evidence supporting his conviction on count 6.

The street terrorism substantive offense, section 186.22, subdivision (a), states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years." There are three elements to the substantive street terrorism offense: (1) active participation in a criminal street gang; (2) knowledge the gang's members have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

"Active participation is defined as 'involvement with a criminal street gang that is more than nominal or passive.' [Citation.] It does not require that 'a person devot[e] "all . . . or a substantial part of his time and efforts" to the gang. [Citation.]' [Citation.]" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) Here, Reveles opined that at the time of the offense, Lopez was an active participant of DH. He based his opinion on several factors, including Lopez committed a robbery with known DH gang members the year before the shooting, DH gang members suspected it was a

La Colonia gang member who shot at a DH gang member's house, the same DH gang member who Lopez committed the robbery with was the DH gang member whose house was shot at, Lopez was with known gang members at the time of the shooting, the shooter trusted Lopez to be the getaway driver, Lopez disposed of items after the shooting, and officers found indicia of gang membership in his car. This was more than sufficient evidence from which the jury could reasonably infer Lopez was an active participant of DH at the time of the offense.

For the first time in his reply brief, Lopez asserts there was no evidence he willfully promoted felonious criminal conduct by DH. Although we need not address this claim (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26), it is meritless. Reveles, in response to a hypothetical mirroring the facts of this case, opined the crimes promoted the gang because they associated with each other to commit violent acts that elevated the gang's status in the community. He explained the violent crimes elevated the gang's status because it demonstrated the gang will not allow itself to be victimized and instilled fear in the community. Therefore, there was sufficient evidence from which the jury could reasonable conclude Lopez willfully promoted, furthered, or assisted felonious criminal conduct by gang members.

Additionally, Lopez relies on *People v. Castenada* (2000) 23 Cal.4th 743, 750, to support his claim there must be evidence he aided and abetted a separate felony offense by gang members. What the *Castenada* court actually stated was that because section 186.22, subdivision (a), requires elements 2 and 3 as stated above, due process requirements of personal guilt are satisfied, and thus section 186.22, subdivision (a), limits liability to those who aid and abet a separate felony offense committed by gang members. Thus, Lopez misinterprets the statute, although he is not the first to do so. (*People v. Salcido* (2007) 149 Cal.App.4th 356, 367.)

Finally, Lopez relies on the following facts to demonstrate he was not an active participant in DH: (1) officers never issued him a STEP notice; (2) officers found

no evidence of gang membership in his home; and (3) Garcia testified Lopez was not from the neighborhood, and he had never seen or heard him claim membership in DH. The sufficiency of the evidence showing active participation is not altered by the existence of other evidence offered by Lopez to show he was not an active participant in the gang. Resolution of conflicting evidence and credibility issues was for the jury to decide. (*Ochoa, supra,* 6 Cal.4th at p. 1206.)

D. Street Terrorism-Enhancement

Lopez asserts insufficient evidence supports the jury's findings he committed counts 1 through 5 for the benefit of and with the specific intent to promote DH because (1) there was no evidence he intended to aid and abet the attempted murders (2) there was no evidence he was associated with DH, and (3) there was no evidence he had the specific intent to commit the attempted murders for the benefit of DH. None of his contentions have merit.

The street terrorism enhancement, section 186.22, subdivision (b)(1), increases the punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

Above, we address Lopez's contention insufficient evidence supports his conviction for attempted murder, and no further discussion of the claim is required. And he does not make the same insufficiency of the evidence claim concerning count 5. The question of the sufficiency of the evidence supporting his convictions is distinct from an inquiry into the sufficiency of the evidence supporting the street terrorism enhancements.

Second, although active participation in a criminal street gang is not an element of the street terrorism enhancement (*People v. Bautista* (2005) 125 Cal.App.4th 646, 656, fn. 5), above we have also explained there was sufficient evidence he was an

active participant in DH at the time of the offense, and therefore he associated with the gang.

Finally, there was sufficient evidence from which the jury could conclude Lopez committed counts 1 through 5 for the benefit of and with specific intent to promote DH. Reveles testified Lopez committed a June 2004 robbery with Renteria, a known DH gang member. The following year, someone shot at Renteria's home, and DH gang members believed it was La Colonia. Reveles testified that in criminal street gang culture, the shooting was a provocative act that required retaliation, or the gang member whose house was shot at would risk losing street credibility for himself and his gang. A few days later, Lopez and at least three other men were driving when one of his passengers told him to make a U-turn. After a passenger confronted one of the men standing on the street, a passenger opened fire on the men. Reveles opined that generally gang members know when another gang member is armed, and other than the shooter, the driver is the most important person because he is trusted to escape without being caught.

Based on these facts, Reveles opined the crimes were committed for the benefit of and with the specific intent to promote DH because the gang members were attacked and days later retaliated. He stated the gang's retaliation elevated the gang's status because it demonstrated the gang would not allow itself to be victimized and the violent response instilled fear in the community. This was sufficient evidence from which the jury could reasonably conclude Lopez drove the car to facilitate the crimes, and therefore, he committed counts 1 through 5 for the benefit of and with the specific intent to promote a criminal street gang.

E. Firearm Enhancements

Lopez claims that because insufficient evidence supports the jury's findings on the street terrorism enhancements, insufficient evidence supports the jury's findings on the firearm enhancements. The amended indictment alleged Lopez was a gang member who vicariously used a firearm (§ 12022.53, subds. (b) & (e)(1)), vicariously

discharged a firearm (§ 12022.53, subds. (c) & (e)(1)), and vicariously discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)(1)). Section 12022.53, subdivision (e)(1), states these enhancement apply to any principal if the person violated section 186.22, subdivision (b), and committed one of the specified offenses. Because we have concluded sufficient evidence supports the street terrorism enhancements, this claim is meritless.

DISPOSITION

The judgment is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.